Supreme Court, U.S.
FILED
MAY 25 2001
OFFICE OF THE CLERK

(3)

No. 00-1615

In the Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY; HARRY C. DENUNE

Petitioners,

v.

CARTER-JONES LUMBER CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondent does not take issue with our legal arguments and makes no effort to explain why the questions presented are not worthy of this Court's review. Instead, respondent has chosen to oppose certiorari solely on the remarkable ground that the important questions raised in the petition "simply are not posed" by this case. Br. in Opp. 1. Thus, respondent declares without explanation that "[t]he only question actually posed in this case is whether the Sixth Circuit properly applied Ohio's common law standards governing piercing the corporate veil." *Ibid.*

But that is simply not true. The questions presented in the petition — whether the Sixth Circuit violated *United States* v. *Bestfoods*, 524 U.S. 51 (1998), by premising indirect CERCLA liability on the corporate shareholder's control over the specific wrongful acts, and whether the Sixth Circuit should have certified the key issue of Ohio law to the Supreme Court of Ohio — were explicitly raised and ruled on below. See Pet. App. 10a-12a. They are issues of federal law, and they are dispositive of this case. Respondent cannot make them go away by counterfactual *ipse dixit*, and its wishful thinking is no substitute for a valid reason to deny certiorari — something that is conspicuously absent from the Brief in Opposition.

1. As to the first issue, respondent seeks to avoid the irreconcilable conflict with *Bestfoods* by claiming that, because the parties stipulated that Ohio law governs the veil-piercing inquiry, the question whether *Bestfoods* permits the use of transaction-specific veil piercing under state law has been waived. Br. in Opp. 1, 5-6. But that is a non-sequitur. The parties agreed only that state law (as opposed to federal common law) governs the question whether Denune exercised sufficient control over the Dixie corporation as a whole to warrant piercing the corporate veil under *Bestfoods*. Petitioners most certainly did not stipulate to the applicability of other rules of Ohio law that might permit veil-piercing in entirely different circumstances. Indeed, the Sixth Circuit expressly recognized

that whether it violates *Bestfoods* to apply in a CERCLA case a state law rule that permits derivative liability based solely on the shareholder's control over the wrongful transaction is an issue of federal law that has been preserved and placed at issue in this case. Pet. App. 10a-11a.

Leaving that red herring aside, respondent has offered no reason why this issue does not warrant this Court's review. As we explain in our petition (at pages 9-12), *Bestfoods* holds that CERCLA looks to the common law *only* to answer the question whether the shareholder's control over the corporation as a whole was sufficient to pierce the corporate veil. Whether the common law of a particular state also allows veil-piercing on a transaction-specific basis is simply irrelevant. Not only does CERCLA not incorporate any such rule, but to allow derivative CERCLA liability on that basis would run directly contrary to the central holding of *Bestfoods* — that the test for derivative liability must focus on the shareholder's control over the corporation, and must be kept distinct from the test for direct liability, which focuses on the shareholder's control over the transaction. Notwithstanding its blithe declaration that "this is a garden variety application of *Bestfoods* and in no event conflicts with that decision," respondent makes no effort whatsoever to address this argument. Br. in Opp. 5.[1]

2. As for the second issue — whether the Sixth Circuit should have certified the key issue of Ohio law to the Supreme

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[1] Respondent's obfuscation culminates in its argument that this Court should deny certiorari because petitioners have not raised the question whether federal common law governs the veil-piercing inquiry. Br. in Opp. 5-6. We did not raise that issue because it is not presented here. Our point is and has always been that, *regardless of whose common law is applicable*, under *Bestfoods*, CERCLA incorporates only the common law test for determining whether the shareholder's control over the corporation as a whole is sufficient to warrant derivative liability.

Court of Ohio — respondent opposes certiorari on the ground that the decision whether to certify "is a matter firmly committed to the court of appeals' discretion." Br. in Opp. 6. Indeed, it is. But this Court has not hesitated in the past to grant certiorari to review discretionary decisions of the lower courts. See, *e.g.*, *Zafiro* v. *United States*, 506 U.S. 534 (1993) (considering whether district court abused its discretion in denying severance under Fed. R. Crim. P. 14); *Blum* v. *Stenson*, 465 U.S. 886, 892 (1984) ("We granted certiorari to consider * * * whether the district court abused its discretion"). Given the momentous federalism issues raised by the discretionary decision whether or not to certify (see Pet. 13, 16-17), there is a dire need for the Court to issue guidance to the courts of appeals to cabin their exercise of that discretion.

In the absence of such guidance, the courts of appeals have adopted conflicting standards, some of which reflect a woefully inadequate respect for the sovereignty of state courts. See Pet. 18-20. Respondent is able to argue that there is no conflict among the circuits only by ignoring the holdings and language of the decisions of the other courts of appeals and by misrepresenting the significance of the Sixth Circuit's holding, pretending that the Ohio case law is in perfect harmony when it plainly is not.

Notwithstanding respondent's assertion to the contrary (Br. in Opp. 7), it is simply incontestible that this case involves an issue of Ohio law governed by a broadly-worded decision of the Ohio Supreme Court that is in tension with more specific decisions of the state's intermediate appellate courts. See Pet. 14-16. And despite respondent's rosy declaration that all of the Ohio appellate court decisions on point reach the same conclusion (Br. in Opp. 7), it is crystal clear that several such decisions seemingly foreclose the result reached below. See Pet. 19-20. Here again, respondent's wishful *ipse dixit* is no reason to deny review.

In these precise circumstances, many other circuits have found it appropriate to certify. See Pet. 18-20; *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999); *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990). The decision below cannot be squared with these holdings.

Indeed, respondent completely ignores the Second Circuit's holding in *Liriano* that "[c]ertification is particularly appropriate when * * * there is some law in the intermediate state courts, but no definitive holding from the state's highest tribunal" (132 F.3d at 132), as well as the Eleventh Circuit's rule that concerns for federalism require certification whenever "'there is *any doubt* as to the application of state law'" (*Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996) (emphasis added)). Even if respondent's characterization of the state of Ohio law were accurate — and it plainly is not — certification would clearly still be appropriate here under either of those standards. As such, this issue is ripe for Supreme Court review and this case presents a perfect vehicle for resolving the conflict.

Respondent's final argument in opposition to review is that the policy concerns that favor certification (see Pet. 16-17) are not implicated here because federal jurisdiction in this case is based on the existence of a federal question, rather than the diversity of the parties (Br. in Opp. 8). That argument completely misses the mark.

The basis for federal jurisdiction is irrelevant. What matters is that the dispositive issue of state law — the circumstances under which the corporate veil may be pierced — is one that can arise in many different contexts, not just in litigation under CERCLA. The Sixth Circuit's decision will lead to significant forum shopping because, from this point on, any plaintiff

seeking to pierce the corporate veil in Ohio, whether his cause of action sounds in tort, in contract, or otherwise, will bring suit in federal court whenever possible in order to get the benefit of the Sixth Circuit's dubiously generous reading of Ohio law, and in order to ensure that the Ohio Supreme Court will not be given the opportunity to vindicate its decision in *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), and to dictate for itself the public policy of the State of Ohio regarding shareholder liability. The Court should grant certiorari to discourage this behavior, to protect our federalism, to resolve the conflict in the circuits, and to provide much-needed guidance on when it is appropriate to certify issues of state law to the state's highest court.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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